

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Leah Wallace,
Plaintiff

v.

Case No. 19-cv-1049-SM
Opinion No. 2022 DNH 012

New Hampshire Ball Bearings, Inc.,
Defendant

O R D E R

Leah Wallace filed this suit against New Hampshire Ball Bearings, Inc., her former employer, asserting violations of the Americans with Disabilities Act ("ADA") and the New Hampshire Law Against Discrimination, N.H. Rev. Stat. Ann. 354-A, and a common law wrongful termination claim. Defendant has moved for summary judgment. Wallace objects.

Standard of Review

When ruling on a motion for summary judgment, the court is "obliged to review the record in the light most favorable to the nonmoving party, and to draw all reasonable inferences in the nonmoving party's favor." Block Island Fishing, Inc. v. Rogers, 844 F.3d 358, 360 (1st Cir. 2016) (citation omitted). Summary judgment is appropriate when the record reveals "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In this context, a factual dispute "is 'genuine' if the evidence of

record permits a rational factfinder to resolve it in favor of either party, and 'material' if its existence or nonexistence has the potential to change the outcome of the suit." Rando v. Leonard, 826 F.3d 553, 556 (1st Cir. 2016) (citation omitted). Consequently, "[a]s to issues on which the party opposing summary judgment would bear the burden of proof at trial, that party may not simply rely on the absence of evidence but, rather, must point to definite and competent evidence showing the existence of a genuine issue of material fact." Perez v. Lorraine Enters., 769 F.3d 23, 29-30 (1st Cir. 2014). In other words, "a laundry list of possibilities and hypotheticals" and "[s]peculation about mere possibilities, without more, is not enough to stave off summary judgment." Tobin v. Fed. Express Corp., 775 F.3d 448, 451-52 (1st Cir. 2014). See generally Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

Factual Background

The material facts, viewed in the light most favorable to Wallace, are as follows. Leah Wallace suffers from a severe latex allergy. She reacts to latex when she is "around it, handle[s] it, [or is] touched by it." Def.'s Exh. 2, Wallace Dep. 50:17. Exposure to latex causes her to develop a variety of symptoms, including: difficulty swallowing, hives, fever, swelling, difficulty breathing (or a complete inability to breath), and, potentially, anaphylaxis. As a result of her

allergy, Wallace has sought emergency care, and has been injected with an EpiPen, which is used to treat life-threatening allergic reactions (anaphylaxis).

Wallace typically manages her allergy by carrying Benadryl, an antihistamine medication, and an EpiPen with her at all times. She also "avoid[s] direct contact with latex," and keeps "latex out of [her] immediate proximity." Pl.'s Exh. 1 at ¶ 5. Her past employers have accommodated her allergy by allowing her to wear non-latex gloves (when gloves were required), or by allowing another employee to perform tasks that involved latex materials. For example, when Wallace worked at a supermarket, another employee would restock grocery shelves that contained latex products. And, when Wallace worked at a cleaning company, her employer switched all employees from latex gloves to non-latex gloves after learning of Wallace's allergy.

On October 21, 2018, Wallace submitted an application for employment at New Hampshire Ball Bearings, Inc. As part of her application, Wallace included a "Voluntary Self-Identification of Disability" form, but did not note that she had a disability. That is because, Wallace says, she did not consider herself "disabled:" she had "always done whatever is necessary to accommodate [herself] and live as normal a life as possible." Pl.'s Exh. 1 at ¶ 6. After filing the application, Wallace was

contacted by Jennifer Dunleavy, who worked in NHBB's Human Resources department, to schedule an interview.

On November 10, 2018, Wallace was interviewed by three NHBB employees at its Laconia facility: Dunleavy; Phil Nichols, Senior Manufacturing Supervisor at the Laconia facility; and Kathy Moulton, Teflon Lead. At the time, NHBB was hiring for three positions: Teflon assembler, machinist, and grinder. During her interview, Nichols gave Wallace a tour of the facility. Wallace informed Dunleavy and Nichols of her latex allergy. They responded that her allergy would not be a problem, and that NHBB could accommodate Wallace by allowing her to use non-latex gloves, and to carry her EpiPen on the factory floor. Following the interview, Moulton and Nichols both recommended that she be hired.

Wallace was offered a position as a Teflon assembler, first shift, entry level, at the NHBB Astro Division at \$14.60 an hour. After a 90-day probationary period, Wallace would be eligible for benefits, including health insurance, dental insurance, life insurance, short-term disability, vacation pay, and holiday pay. Wallace accepted the position, although she later conceded she was disappointed that she was not offered a

position as a machinist.¹ See Def.'s Exh. 2, Wallace Dep. 178:18-20.

On December 10, 2018, Wallace, along with approximately 12 other new NHBB employees, began NHBB's 13-day orientation course. Wallace participated in the first day of orientation, including a tour of the manufacturing facility.² During the tour, she observed that several of the Teflon assemblers were wearing latex gloves in close proximity to each other.

Orientation continued on December 11, 2018. After the morning training session, Dunleavy was assisting new employees with completing on-boarding paperwork when she was approached by Wallace. Referencing her latex allergy, Wallace asked Dunleavy if she could be hired for the machinist position instead of the Teflon assembler position. As Wallace later explained:

¹ NHBB's machinist position commanded a higher pay grade, and required additional training and experience. See Def.'s Exh. 5, Dunleavy Dep. 45:15-19 ("typically, [machinist] positions . . . are labor grade six, and she was hired for a labor grade four, so that was a couple of labor grades higher than the one she was hired for.").

² Wallace also received a copy of the NHBB employee handbook, which requests that new employees notify human resources if accommodation is required to perform the essential functions of the position due to disability. The handbook further notes that employees may be required to provide medical documentation regarding the disability, and regarding accommodations that may be effective. See Def.'s Exh. 2, Wallace Dep. 75:20-76:20.

Q: [W]hy were you asking to change from Teflon to machinist?

Wallace: Just, like, the close proximity for, like, my allergy. There was only, like, three people in that machinist area and Teflon had like 20 people.

Q: . . . When you say people, just being close proximity to people was your concern?

Wallace: Just being [in] close proximity to people working with latex gloves.

Def.'s Exh. 2, Wallace Dep. 80:7-15. Wallace reasoned that, because there were fewer machinists than Teflon assemblers, if she worked as a machinist, fewer employees would need to switch to non-latex gloves to accommodate her allergy.³ Dunleavy agreed to speak with NHBB's Human Resources Manager, Nicole Parker, about Wallace's request, and, as promised, spoke with Parker later that day.

The next morning, Parker pulled Wallace out of orientation to discuss the request. During that conversation, Wallace explained that her latex allergy was quite severe. She told Parker that she had once suffered "a significant reaction in [a] . . . restaurant when another patron was sitting less than a foot from [her] at the bar counter while wearing latex Croc

³ Wallace says that, when she spoke with Dunleavy, she was unaware that the machinist position was a higher pay grade than the Teflon assembler position, and required additional experience. Def.'s Exh. 2, Wallace Dep. 82:12-21.

shoes.” Pl’s Exh. 1, ¶ 16. Wallace told Parker that she was requesting a transfer to the machinist position because she had seen “many employees working in Teflon in close proximity to each other wearing latex gloves,” and she needed to “keep latex out of . . . close proximity.” Id. at ¶ 17.

Parker was (understandably) concerned. See Def.’s Exh. 4, Parker Dep. 32:15-20 (“Her story about being around Crocs at a restaurant . . . was very disconcerting to us, not really understanding what that meant in a facility that has 500 employees, latex sneakers or shoes or whatever could be around her.”). Wallace and Parker discussed prior accommodations made by Wallace’s former employers. According to Wallace, she told Parker that she was able to capably manage her latex allergy by keeping latex “out of . . . close proximity and carrying Benadryl and an EpiPen at all times.” Pl’s Exh. 1, ¶ 18. But, based on the potential airborne nature of Wallace’s allergy, Parker was worried that those precautions would not be sufficient to protect Wallace, and wanted to better understand what Wallace meant by “close” proximity to latex. See Def.’s Exh. 4, Parker Dep. 35:19-36:1 (“Space, you know, how close can she be [to latex] She said she could smell it. Does that mean she can't be around it at all? We needed more information on the scope of what her allergy was and how and what accommodation her physician felt she would need to work

here.”). As Parker explained, “I was not comfortable. My job is to provide a safe work environment for all employees, and not understanding what an airborne allergy could do to somebody was very unnerving.” Def.’s Exh. 4, Parker Dep. 53:17-20.

Parker reached out to NHBB’s Plant Services Manager, Herbert Parkhurst,⁴ to discuss sources of latex exposure in the NHBB facility, including building materials, manufacturing supplies, and coworkers’ clothing (since Wallace told Parker about her reaction to Crocs at the restaurant bar). Parker also emailed Patti Carrier, who served as NHBB’s environmental manager in its Peterborough HiTech Division, and was assisting with the Laconia facility’s safety program, for advice. See Pl.’s Exh. 11. Carrier responded that, because Wallace said that her latex allergy was airborne, Carrier “wasn’t positive [NHBB] could keep her away from a potential exposure.” Id. She mentioned that Peterborough had eliminated latex gloves from its facility, and suggested that the Laconia facility might do the same. Both Parker and Carrier agreed that, before taking action, NHBB needed additional information from Wallace’s physician concerning her allergy.

⁴ Parkhurst had spoken with Wallace earlier during orientation when she asked for permission to carry her EpiPen while working on the factory floor. Parkhurst assured her that it would not be a problem.

Parker then met with Wallace again, and asked her to provide a note from her physician describing her allergy and its "parameters," so NHBB could determine whether or how she could be accommodated. Def.'s Exh. 4, Parker Dep. 54:4-6. Parker then sent Wallace home for the day. Wallace immediately contacted her physician's office, and asked them to fax NHBB a note concerning her latex allergy. Her physician's office promptly did so, faxing NHBB a letter that stated Wallace: "has a severe latex allergy which can result in anaphylaxis. This is a serious reaction which would require immediate medical intervention." Pl.'s Exh. 12.

Parker called Wallace after receiving the doctor's note. Parker explained to Wallace that the medical note was insufficient because it lacked detail, and did not adequately explain what accommodations would be sufficient so that Wallace could safely perform her job at NHBB.⁵ Def.'s Exh. 2, Wallace Dep. 105:11-14, 109:13-14. Wallace promptly reached out again to her physician, requesting a more detailed letter. However,

⁵ In her affidavit, Wallace states that Parker did not tell her what specific details NHBB required. See Pl.'s Exh. 1 at ¶ 21. But, her deposition testimony is to the contrary, as she testified that, during her December 12, 2018, phone call with Parker, Parker told her that NHBB required a note stating "how many feet" Wallace could be "within latex." Def.'s Exh. 2, Wallace Dep. 105:11-14; 109:13-14.

her physician's office told her that they were unable to provide a more detailed letter.

Wallace returned to orientation the next day, December 13, 2018, but was again pulled out of orientation to discuss her latex allergy with Parkhurst and Parker. As Parkhurst later summarized:

we talked about gloves, and I remember telling her that, you know, if, you know, your sensitivity is just, you know, latex gloves, that's very easy to just wear nitrile. They're all over the place. And then she brought up that she had had a reaction to someone's shoes at a restaurant, and for me that totally changed how we needed to view her, her issue because if she's - - if she has an airborne issue, you know, whether it's inhalation or aspiration, that's an entirely different animal to deal with than a glove that's on your hand with a skin contact, you know, because then you're talking about dosage and duration, and I needed to know a lot more specifics about how to protect her from that type of hazard.

Pl.'s Exh. 10, Parkhurst Dep. 24:19-25:11. Parkhurst suggested that the entire facility could be converted to non-latex gloves, but noted that while "it could physically be done," he was "concerned that if [Wallace] has a reaction to someone's shoes, just changing out gloves isn't going to help." Id. at 26:1-5.

Wallace told Parker and Parkhurst that her allergy could be accommodated if she avoided latex, and by carrying her EpiPen and Benadryl. But, both Parker and Parkhurst felt that additional medical information was necessary so that they could

best determine how to safely accommodate Wallace's allergy. See Def.'s Exh. 4, Parker Dep. 40:1-10 ("[Wallace] said that she had a latex allergy. She accepted the fact that Phil told her she could wear nonlatex gloves, so we did initially accommodate her based on her information. She then changed it to 'I [have an] airborne allergy,' which is very different than contact, something we've never dealt with before, so we asked for further medical information so that we could better understand what accommodation she needed."). Wallace was sent home again with instructions that she should not return to work until she could provide NHBB with more detailed medical information concerning her allergy.⁶ See Pl.'s Exh. 2, Wallace Dep. 112:6-9.

Wallace reached out again to her physician's office. Her doctor suggested that she visit an allergist, who might be able to provide NHBB with the requested information. Wallace called to schedule an appointment with an allergist, but was informed it might be several months before she was able to see the doctor. Wallace then called Parker and left her a voice message. She stated that she would not be able to visit the

⁶ Wallace's testimony is again inconsistent on that point. In her affidavit, Wallace states that Parker failed to specify what details were needed. See Pl.'s Exh. 1 at ¶ 23. But, at deposition, Wallace testified that Parker and Parkhurst told her "they wanted a more detailed doctor's note of how many feet [she] could be within [latex]," and that she could not return until she had obtained that note. Def.'s Exh. 2, Wallace Dep. 112:6-9.

allergist for "some[]time," and so could not immediately provide NHBB with the medical information requested. Pl.'s Exh. 14. Wallace stated that she was ready and willing to work at NHBB in the meantime.

Accordingly, Wallace returned to orientation on December 17, 2018, hoping to work. Parker met her in the lobby. Wallace again explained that she would not be able to get the medical information NHBB required until her appointment with the allergist, which, she stated again, might take some time. Because Wallace had not provided the information that NHBB had requested, Parker terminated Wallace's employment. She told Wallace that if she could obtain a more detailed medical note, she should contact NHBB, and "we'll talk about a rehire." Def.'s Exh. 4, Parker Dep. 61:16-18; Def.'s Exh. 2, Wallace Dep. 122:7-9.

On January 18, 2019, Wallace visited the allergist. The doctor told her to carry Benadryl and an EpiPen with her at all times, and to keep latex products more than an arm's length away from her. The allergist provided Wallace with a note stating: "Leah A Wallace is a 21 [year old] y.o. patient of mine with a

history of latex allergy. I recommend avoiding latex in the workplace.”⁷ Pl.’s Exh. 15.

Wallace filed a Charge of Discrimination with the New Hampshire Commission for Human Rights. In March, 2019, defendant sent Wallace a letter offering reinstatement as a Teflon assembler based on the information set forth in Wallace’s Charge that described her allergist’s recommendation. Wallace did not accept NHBB’s offer.

Discussion

Wallace contends that NHBB violated the Americans with Disabilities Act, and the New Hampshire Law Against Discrimination, N.H. Rev. Stat. Ann. 354-A, by (1) failing to accommodate her disability; (2) terminating her due to her disability; and (3) retaliating against her for requesting an accommodation. Similarly, in support of her wrongful termination claim, Wallace alleges that NHBB terminated her employment in “bad faith, malice, and/or retaliation.” Compl. ¶ 40. As mentioned, defendant moves for judgment on all of Wallace’s claims.

⁷ In a January 18, 2019, letter to Wallace, Wallace’s allergist wrote that she recommended “strict avoidance of latex.” Def.’s Exh. A.

Count 1: Disability Discrimination

With regard to Wallace's claims alleging disability discrimination, our Court of Appeals has stated:

The ADA provides 'a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" Ruiz Rivera v. Pfizer Pharms., LLC, 521 F.3d 76, 82 (1st Cir. 2008) (quoting Katz v. City Metal Co., 87 F.3d 26, 30 (1st Cir. 1996)). Indeed, "[t]he ADA was enacted for 'the elimination or reduction of physical and social structures that impede people with some present, past, or perceived impairments from contributing, according to their talents, to our Nation's social, economic and civil life....'" Ramos-Echevarría v. Pichis, Inc., 659 F.3d 182, 186 (1st Cir. 2011) (quoting Tennessee v. Lane, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring)).

Ortiz-Martinez v. Fresenius Health Partners, PR, LLC, 853 F.3d 599, 604 (1st Cir. 2017). "To establish a claim under the ADA, a plaintiff must prove three factors by a preponderance of the evidence: (1) she was disabled within the meaning of the ADA; (2) she was qualified to perform the essential functions of the job, either with or without reasonable accommodation; and (3) the employer took an adverse employment action against her because of the alleged disability." Colon-Fontanez v. Municipality of San Juan, 660 F.3d 17, 32 (1st Cir. 2011) (citations omitted).⁸

⁸ "As . . . this court and the New Hampshire Supreme Court have recognized, claims under Section 354-A are construed in conformity with the ADA." Gage v. Rymes Heating Oils, Inc., No. 14-CV-480-PB, 2016 WL 843262, at *5 (D.N.H. Mar. 1, 2016) (Barbadoro, J.) (citing Montemerlo v. Goffstown Sch. Dist., SAU No. 19, No. 12-CV-13-PB, 2013 WL 5504141, at *5 (D.N.H. Oct. 4, 2013) (collecting cases). Wallace's arguments concerning her

1. Wallace is an Individual with a "Disability."

Defendant first argues that Wallace has not sufficiently established that she suffers from a disability within the meaning of the ADA. The Act defines "disabled" as: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2) (A). "There is no per se rule about either the type or quantum of evidence that a plaintiff seeking to establish a disability must supply." Mancini v. City of Providence by & through Lombardi, 909 F.3d 32, 39 (1st Cir. 2018) (citation omitted).

Defendant asserts that Wallace has not demonstrated that her latex allergy substantially limits major life activities. It argues that Wallace herself did not perceive her allergy as a

"Section 354-A claim rise and fall on the same bases as [her] ADA arguments," and so the court's analysis applies equally to Wallace's Section 354-A claim. Id.

disability, as she marked that she was not disabled on her employment application. And, defendant says, Wallace has stated that her latex allergy can be easily addressed simply by avoiding contact with latex, and that she has held numerous other jobs that required minimal accommodation. So, defendant says, her allergy was not severe enough to limit a major life activity.

Wallace responds that her latex allergy limits life activities of breathing, swallowing, and body temperature regulation. She points out that, in 2008, the ADA was amended to modify the Act's definition of "disability," see 42 U.S.C. § 12102, and, under the amended ADA, "[t]he definition of disability ... shall be construed in favor of broad coverage of individuals ... to the maximum extent permitted by the [Amendments]." 42 U.S.C. § 12102(4)(A).

The ADAAA provides that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 42 U.S.C. § 12102(4)(D). "The determination of whether an impairment substantially limits a plaintiff's major life activities shall be made without regard to the ameliorative effects of mitigating measures such as" learned behavioral modifications. Id. at § 12102(4)(E).

Wallace's primary care physician wrote that her latex allergy is severe, and "can result in anaphylaxis. This is a serious reaction which would require immediate medical intervention." Pl.'s Exh. 12. Thus, when triggered, Wallace's allergy limits certain life activities, including her ability to breath. "Unobstructed breathing clearly qualifies as a major life activity." Lima v. Middlesex Sheriff's Office, et al., No. CV 19-11372-RGS, 2020 WL 823088, at *5 (D. Mass. Feb. 19, 2020) (citing Ramos-Echevarria, 659 F.3d at 187 (quoting 29 C.F.R. § 1630.2(i))).

Defendant relies heavily on Jimenez-Jimenez v. Int'l Hosp. Grp., Inc./Casino del Sol, No. 15-1461 (SCC) 2017 WL 5905529 (D.P.R. Nov. 30, 2017), a case in which the plaintiff suffered from an allergic condition triggered by some perfumes and chemicals. The Jimenez-Jimenez plaintiff's "reactions were not necessarily immediate," but varied based on the scent and strength, and, by moving away from the smell, plaintiff was able to remedy the situation. Id. at *4. Critically, unlike Wallace, plaintiff's allergy only manifested when exposed to an allergen at work. See id. at *9 ("we have found no evidence that Jiménez' condition was triggered outside of his place of employment. Therefore, the plaintiff has not made a sufficient showing that his condition rendered him disabled within the

meaning of the ADA.”). For that reason, defendant’s reliance is misplaced.

Keeping in mind that “the primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA,” 29 C.F.R. § 1630.1(c)(4), and taking the summary judgment record in the light most favorable to Wallace, as the court must, an informed juror could conclude that Wallace suffers from a disabling condition under the ADA. The court will, then, assume that plaintiff qualifies as “disabled” for summary judgment purposes.

2. NHBB Attempted to Accommodate Wallace’s Disability.

Wallace alleges that NHBB failed to provide her with reasonable accommodation under the ADA and N.H. Rev. Stat. Ann. 354-A. “Under the ADA an employer is required to make ‘reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on [its] operation of the business.’” Ortiz-Martinez, 853 F.3d at 604 (quoting 42 U.S.C. § 12112(b)(5)(A)) (further citations omitted). “[P]laintiff bears the burden of proposing an accommodation that would enable him to perform his

job effectively and is, at least on the face of things, reasonable.” Kvorjak v. Maine, 259 F.3d 48, 55 (1st Cir. 2001).

Defendant argues that Wallace has failed to produce evidence upon which an informed jury could conclude that NHBB unlawfully denied Wallace an accommodation. The court agrees.

The evidence of record demonstrates that Wallace first asked NHBB to accommodate her latex allergy by allowing her to carry an EpiPen and Benadryl, and to wear non-latex gloves. NHBB readily agreed to those reasonable requests, on multiple occasions. But, after she observed the Teflon assemblers working in close proximity to each other, wearing latex gloves, Wallace was concerned that her earlier requested accommodation would not sufficiently protect her. So, she asked NHBB for an additional accommodation in the form of a job change (from Teflon assembler to machinist), a job for which she had not been hired, and for which she was neither trained nor had the requisite experience. In support of that accommodation request, Wallace informed the company that she could not be in “close proximity” to latex (but she did not describe what she meant by “close proximity,” and described a past allergic reaction triggered by latex in a restaurant patron’s shoes). Based on Wallace’s statements, NHBB reasonably understood that the accommodations she previously requested and to which NHBB had

agreed (carrying an EpiPen and Benadryl, and wearing non-latex gloves) would not be sufficient to allow her to work effectively as a Teflon assembler.

Notably, the company did not reject Wallace's request to change jobs. Instead, NHBB requested additional information so that it could assess the feasibility of her request, and how the company might best accommodate her disability. See Pl.'s Exh. 10, Parkhurst Dep. 25:4-11 (" [I]f she has an airborne issue, you know, whether it's inhalation or aspiration, that's an entirely different animal to deal with than a glove that's on your hand with a skin contact, you know, because then you're talking about dosage and duration, and I needed to know a lot more specifics about how to protect her from that type of hazard."). As defendant states: "NHBB needed to know how close Wallace could safely be in proximity to latex to appropriately evaluate the adequacy and reasonableness of an accommodation." Def.'s Mot. for Summary Judgment at 14. NHBB of course had no interest in transferring Wallace to a machinist position if it would not reasonably and adequately address the extent to which her latex exposure needed to be limited or eliminated. And, Wallace's statements that she needed to keep latex out of her "close proximity" gave NHBB little specificity regarding how far Wallace needed to stay away from latex to avoid triggering an allergic reaction.

Parker explained her thinking at the time:

Q: And did you, ultimately, speak with Herb Parkhurst about what possibly you could do to accommodate Leah Wallace?

A. I didn't talk to him about accommodating. I talked about better understanding what the -- what he thought about an airborne allergen for latex and what that meant. You know, is there latex in 500 employees' sneakers? Is there latex in their hair bands? Do we use latex paint on the walls? I needed to better understand from our facility what we use for latex.

. . .

Q. Okay. And what do you recall Herb telling you?

A. Herb didn't have an understanding either of the impact of, you know, these Crocs that she had an allergic reaction to. You know, are they latex? Does that mean that -- you know, again, we have 500 employees walking around. Is there latex in their shoes? He knows from the facilities that there's latex in the paint on the walls in some areas, . . . neither one of us had a good understanding of what an airborne latex allergy meant. And, again, that is why we really needed Leah to get that clarification and recommendations from her physician.

Def.'s Exh. 4, Parker Dep. 54:7-55:12.

E.E.O.C. Enforcement Guidance provides that an employer is entitled to seek limited records sufficient to substantiate the claimed disability and accommodation if the employee has presented insufficient supporting documentation. See Turcotte v. Comcast Cable Commc'ns Mgmt., LLC, No. 17-CV-150-PB, 2019 WL 635409, at *12-13 (D.N.H. Feb. 14, 2019) (citing E.E.O.C.

Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (2000), 2000 WL 33407181 at *9). See also Badri v. Huron Hosp., 691 F.Supp.2d 744, 763 (N.D. Ohio 2010) ("An employer is not required to speculate as to the extent of an employee's disability or the employee's need or desire for an accommodation. Defendants had the right to substantiate their concerns before they considered accommodations.") (citations omitted). NHBB's request for additional medical information regarding airborne triggering of latex allergies to determine an appropriate accommodation for Wallace was reasonable, especially given the company's lack of knowledge or expertise, generally, and with respect to Wallace's latex allergy, specifically, as well as the ambiguity of the information that Wallace had provided, including her report of a prior latex reaction triggered by a restaurant patron's footwear.

Again, the burden was on Wallace to establish that the accommodation she was requesting (a different job) was both reasonable,⁹ and could be performed effectively with particular

⁹ While the ADA provides that reasonable accommodation may include "reassignment to a vacant position," 42 U.S.C. § 12111(9)(B), "an employee must demonstrate that a vacant position existed and that she was qualified for it." Turcotte, 2019 WL 635409, at *6.

The record evidence does not show that Wallace made any effort to establish she was qualified for the machinist position

and reasonable accommodation. See Kvorjak, 259 F.3d at 55.

While NHBB agreed to accommodate Wallace's initial requests, her request evolved substantially (an entirely new job), and, as noted, the information she had provided to NHBB in support of her request disclosed a disability of greater sensitivity than initially suggested, and one that might very well have not been easily accommodated by changing to non-latex gloves. As defendant argues, "a transfer to the machinist position did not address the underlying issue, the extent to which latex exposure had to be limited or eliminated, . . . which necessitated further medical documentation." Def.'s Mot. in Support of Summary Judgment at 14.

"[A]n employee cannot demand an accommodation and then fail or refuse to provide the employer with information critical to determining whether the accommodation is necessary and reasonable." Willinghan v. Town of Stonington, 847 F. Supp. 2d 164, 189 (D. Me. 2012). See also Templeton v. Neodata Servs., Inc., 162 F.3d 617, 619 (10th Cir. 1998) ("An employer cannot be expected to propose reasonable accommodation absent critical

as an accommodation. And, Wallace's briefing gives little attention to the fact that she requested a transfer to the machinist position; she characterizes that request as one for a "position other than Teflon," pl.'s obj. to motion for summary judgment at 5, but offers no evidence that she had the training, skills, or experience to satisfy the machinist job's requirements, or that she had some other job in mind.

information on the employee's medical condition and the limitations it imposes."). Wallace does not dispute that she did not provide NHBB with the medical information the company needed to assess her request. She did not even provide NHBB with a date certain on which she would provide the information. Given these facts, Wallace's contention that NHBB failed to engage in the interactive process is puzzling.

It is well-settled that an employee's accommodation request may "create[] a duty on the part of the employer to engage in an interactive process." E.E.O.C. v. Kohl's Dep't Stores, Inc., 774 F.3d 127, 132 (1st Cir. 2014) (quotation omitted). That process "involves an informal dialogue between the employee and the employer in which the two parties discuss the issues affecting the employee and potential reasonable accommodations that might address those issues." Id. (citing 29 C.F.R. § 1630.2(o)(3)). As our court of appeals has instructed:

[I]t is imperative that both the employer and the employee have a duty to engage in good faith, and that empty gestures on the part of the employer will not satisfy the good faith standard. If an employer engages in an interactive process with the employee, in good faith, for the purpose of discussing alternative reasonable accommodations, but the employee fails to cooperate in the process, then the employer cannot be held liable under the ADA for a failure to provide reasonable accommodations.

Id. at 132 (citations omitted). See also Turcotte, 2019 WL 635409, at *12 ("An employee who refuses to comply with an

employer's reasonable request for medical information pertaining to her disability can be found to have obstructed the process.") (citing Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1136 (7th Cir. 1996) (affirming summary judgment for employer where employee refused to sign medical records release form that employer requested due to insufficient information about her work restrictions); and Templeton, 162 F.3d at 618-19 (affirming summary judgment for employer because employee refused to authorize her physician to release medical information that employer reasonably requested)). The evidence here compels the conclusion that it was Wallace who raised the specter of a highly sensitive and dangerous allergic risk caused by latex "in close proximity," even illustrating her vulnerability by suggesting an airborne risk, but who failed to provide any reliable medical information regarding the nature and extent of her particular allergy, or the extent to which an employer should insulate her from exposure to latex in the workplace.

Wallace also references a variety of accommodations that NHBB purportedly failed to offer her, including transitioning the entire facility to non-latex gloves. She argues that, although Wallace asked to transfer to the machinist position, "NHBB could have simply offered to have the other Teflon employees switch to nitrile gloves, could have transitioned to a complete latex ban like [NHBB's] HiTech [facility] in

Peterborough, or could have developed another accommodation all together.” Pl.’s Opp. to Motion for Summary Judgment at 20. But, Wallace did not request any of those accommodations. And, all of those proposals would not address latex in a co-worker’s footwear, or clothing, or a myriad of other products. NHBB was entitled to request substantiating medical information from which it could assess the scope of Wallace’s allergy, and what accommodations could be reasonably fashioned to effectively provide her with a safe workplace.

Finally, Wallace argues that NHBB’s subsequent offer to rehire her supports her contention that defendant failed to accommodate her disability. She says that, because NHBB offered to rehire her, “NHBB could have accommodated Ms. Wallace all along,” since Wallace “simply needed to keep latex out of her immediate proximity, carry an EpiPen, and carry Benadryl.” Pl.’s Obj. to Mot. for Summary Judgment at 11-12. But, NHBB agreed to those accommodation requests while Wallace was employed by NHBB. It was only after Wallace disclosed that those agreed-upon accommodations might be insufficient (since she could not have latex in her “close proximity”) that NHBB asked her to provide medical information in support of her request.

Wallace has not pointed to admissible evidence sufficient to support a reasonable jury's conclusion that NHBB denied her reasonable accommodations under the ADA or N.H. R.S.A. 354-A.

3. Wallace Was Not Terminated Due to her Disability.

Wallace similarly fails to point to record evidence sufficient to support a juror's conclusion that she was terminated by NHBB as a result of her disability. Wallace says that it cannot be "genuinely disputed that NHBB would not have terminated Ms. Wallace on December 17, 2018, but for her disability disclosure and request for accommodation." Pl.'s Obj. to Mot. for Summary Judgment at 22.

To the contrary, Wallace has not established that she is a "qualified individual" within the meaning of the ADA. She was hired by NHBB as a Teflon assembler. She promptly informed NHBB that, in order to perform the job, she'd need to carry an EpiPen, and wear non-latex gloves. NHBB readily agreed. Wallace then informed NHBB that those agreed-upon accommodations would not be sufficient to allow her to safely perform that job; that she needed to keep latex out of her "close proximity," and could not do that as a Teflon assembler, so needed to work as a machinist. NHBB cannot be faulted for believing Wallace when she said she could not safely perform the job of Teflon assembler due to the close proximity of co-workers wearing latex

gloves (and perhaps footwear). Nor can NHBB be faulted for requesting more specific medical information in support of Wallace's request, as set forth supra. Because Wallace told NHBB she could not safely perform the job for which she was hired, and because she did not provide medical information sufficient for NHBB to assess her request for accommodation, NHBB terminated her employment.

The overriding problem with Wallace's argument is that she suggested to NHBB that she could not perform the essential functions of her job (Teflon assembler) because of her latex allergy, and needed to switch to a machinist position. In other words, Wallace complains that she was terminated from a job that she told the company she could not safely perform because of her latex allergy. When NHBB endeavored to determine how to accommodate her so that she could perform the essential functions of that job, or another, she was unable to provide NHBB with the information requested. Given that factual record, a reasonable jury could not supportably find that Wallace sufficiently established that she was qualified for the Teflon assembler position, with or without a reasonable accommodation. And, she made no such showing with respect to any other available positions. See Crowe v. Appalachian Stitching Co., LLC, No. 2021-0129, 2021 WL 6069200, at *3 (N.H. Dec. 23, 2021) (plaintiff "was not a 'qualified individual' while she remained

unable to work") (citing Peyton v. Fred's Stores of Arkansas, Inc., 561 F.3d 900, 903 (8th Cir. 2009) ("it is axiomatic that a person who cannot perform any of the functions of a job, with or without reasonable accommodation, cannot, as a matter of law, be considered 'otherwise qualified' under the ADA.")).

Even assuming, arguendo, that Wallace has sufficiently established a prima facie case, to avoid summary judgment, Wallace must also "show by a preponderance of the evidence that [NHBB's] proffered reason" to discharge was "pretextual and that the actual reason for the adverse employment action [was] discriminatory." Johnson v. Univ. of P.R., 714 F.3d 48, 54 (1st Cir. 2013) (further citation omitted).

Wallace fails to point to admissible evidence tending to show that NHBB's proffered reason for terminating her employment (her failure to provide requested medical information) was pretextual. She argues that pretext may be inferred from the fact that NHBB allowed her only a short period of time to obtain the requested information, and rejected the physician's note that she did submit.¹⁰ NHBB could perhaps have been more

¹⁰ Wallace also argues that NHBB's discrimination against her was intentional and reckless. She contends that Parker concluded that she was not disabled because she had not checked that box on NHBB's Self-Identification of Disability form. That argument is unconvincing, as she points to no evidence that

generous in the time allowed Wallace to obtain the information requested, especially once she informed NHBB that she needed to schedule an appointment with an allergist. But, that NHBB's timeline may have been short does not mean that it was discriminatory. See Acevedo-Parrilla v. Novartis Ex-Lax, Inc., 696 F.3d 128, 140 (1st Cir. 2012) ("mere questions regarding the employer's business judgment are insufficient to raise a triable issue as to pretext") (citations omitted). Testimony by Parker and Parkhurst suggests that both were genuinely worried that Wallace would not be safe at the NHBB facility. See, e.g., Def.'s Exh. 4; Parker Dep. 32:1-4 ("I didn't feel like I could provide her a safe work environment without understanding better what it is that she needed."); Pl.'s Exh. 10; Parkhurst Dep. 25:9-11 ("I needed to know a lot more specifics about how to protect her from that type of hazard."). And, Wallace's argument ignores that she did not provide NHBB with a date certain by which she would likely be able to provide the requested information (or even the date of her allergist appointment). Finally, Wallace's argument that NHBB should have just allowed her to work (presumably as a Teflon assembler) until she was able to obtain the requested information cannot be squared with the factual record. As mentioned supra, it was Wallace who informed NHBB that she was unable to work safely as

Parker relied on Wallace's form in any way in making the decision to terminate her.

a Teflon assembler with the previously agreed upon accommodations. The company cannot be faulted for taking her statements seriously.

On this record, a reasonable jury could not plausibly infer that discriminatory animus was a motivating factor in her termination. Defendant is entitled to judgment on plaintiff's discrimination claim under the ADA and N.H. Rev. Stat. Ann. Section 354-A.

Count II: Retaliation

Wallace further claims that her request for accommodation constituted protected conduct, and, as a result of her request, her employment was terminated. Therefore, she contends, NHBB unlawfully retaliated against her in violation of the ADA and NH RSA Section 354-A.

Pursuant to the ADA's retaliation provision, "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter." 42 U.S.C. § 12203(a).¹¹ "To establish a claim of

¹¹ "The New Hampshire Supreme Court looks to and finds 'instructive' federal standards established under Title VII ... in resolving retaliation claims under N.H. Rev. Stat. Ann. § 354-A." Dennis v. Osram Sylvania, Inc., 549 F.3d 851, 856 (1st Cir. 2008) (quoting Madeja v. MPB Corp., 149 N.H. 371, 378-79 (2003)). Accordingly, the court relies on cases interpreting

retaliation, a plaintiff must show that (1) she engaged in protected conduct, (2) she suffered an adverse employment action, and (3) there was a causal connection between the protected conduct and the adverse employment action.” Freadman v. Metro. Prop. & Cas. Ins. Co., 484 F.3d 91, 106 (1st Cir. 2007) (citations omitted).

Wallace of course engaged in protected activity by seeking accommodation for her disability. See Carreras v. Sajo, Garcia & Partners, 596 F.3d 25, 35 (1st Cir. 2010). Her contention that she would not have been terminated had she not requested an accommodation, however, is not supported by the evidence of record.

“Once a plaintiff makes out a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment decision.” Carreras, 596 F.3d at 36 (quotations and citations omitted). “If the employer produces a legitimate reason for its decision, the burden under McDonnell Douglas shifts back to the plaintiff to show that the motive was discriminatory [or retaliatory].” Id. (quotations and citations omitted). “Thus,

the ADA to assess Wallace’s retaliation claim under N.H. Rev. Stat. Ann. Section 354-A as well.

the plaintiff bears the ultimate burden to create a plausible inference that the employer had a retaliatory motive.” Id. (citing Benoit v. Technical Mfg. Corp., 331 F.3d 166, 174 (1st Cir. 2003)).

Defendant has responded that Wallace was terminated because she failed to provide necessary information for NHBB to determine whether it could provide her with a safe working environment. Thus, even assuming that Wallace has adequately established a prima facie case of retaliation, she must also establish that NHBB’s stated reason for terminating her employment was pretextual. As set forth above, she fails to muster evidence sufficient to do so. Instead, the evidence reveals that Wallace was terminated because she informed NHBB she could not safely perform the job for which she was hired, and failed to provide the medical information NHBB requested in order to assess what reasonable accommodation might be available to allow her to safely perform the job she was hired to do. Wallace also has not pointed to any evidence that suggests that NHBB harbored any retaliatory animus based on her requests for accommodation. Indeed, the evidence is to the contrary: NHBB readily granted several of her initial accommodation requests before asking for additional medical information after Wallace informed the company that she could not have latex in her vicinity.

Accordingly, no reasonable jury, on the record, could conclude that Wallace was terminated because she requested an accommodation. NHBB is entitled to summary judgment on Wallace's retaliation claim.

Count III: Wrongful Discharge

For similar reasons, NHBB is entitled to judgment on Wallace's wrongful discharge claim. A plaintiff claiming wrongful termination under New Hampshire law must establish: (1) her termination was motivated by bad faith, retaliation or malice; and (2) she was terminated for performing an act that public policy would encourage or for refusing to do something that public policy would condemn. Lacasse v. Spaulding Youth Ctr., 154 N.H. 246, 248 (2006). Wallace alleges that because she was terminated six days after she took an action that public policy would encourage (requesting accommodation for her disability), a jury could find that she was wrongfully terminated.

The factual record does not support Wallace's position. Temporal proximity between action and reaction, alone, is not enough. The evidence shows that Wallace was terminated not because she requested an accommodation (which was initially readily granted), but because she did not provide the medical

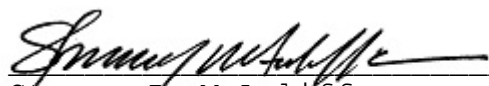
information necessary for NHBB to access her evolving accommodation request, and because she informed the company that she could not safely perform the job for which she was hired. Wallace also fails to point to evidence that might support a finding that her termination was motivated by bad faith, retaliation, or malice.

Accordingly, defendant is entitled to judgment on plaintiff's common law claim for wrongful termination.

Conclusion

For the foregoing reasons, as well as those set forth in defendant's memoranda, defendant's motion for summary judgment (docket no. 16) is granted. The Clerk of Court shall enter judgment in accordance with this order and close the case.

SO ORDERED.


Steven J. McAuliffe
United States District Judge

January 31, 2022

cc: Counsel of Record